No. 701

In the Supreme Court of the United States

OCTOBER TERM, 1955

CURTIS REID, SUPERINTENDENT OF THE DISTRICT OF COLUMBIA JAIL, APPELLANT

v.

CLARICE B. COVERT

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLANT

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OPINION BELOW

The opinion of the District Court granting the writ of habeas corpus (R. 131–134) is not reported.

JURISDICTION

On November 22, 1955, the District Court entered an order granting appellee a writ of habeas corpus and ordering her discharge from the custody of appellant (R. 134). A notice of appeal to this Court was filed in the District Court on December 22, 1955 (R. 135–136). The jurisdiction of this Court to review on direct appeal the

decision of the District Court, granting the writ of habeas corpus on the ground that the Act of Congress under which the appellee was being held for rehearing by court-martial is unconstitutional, is conferred, we believe, by 28 U. S. C. 1252. On March 12, 1956, this Court postponed further consideration of the question of jurisdiction to the hearing of the case on the merits, and transferred the case to the summary calendar (R. 145). The jurisdictional issue is discussed in Point I of our Argument, pp. 6–8, 13–27, *infra*.

QUESTIONS PRESENTED

1. Whether the Superintendent of the District of Columbia Jail, who holds appellee for the United States Air Force, is "an officer or employee" of the United States or of an agency thereof within the purview of 28 U. S. C. 1252, so that this Court has jurisdiction of this appeal.

2. Whether Congress has power under the Constitution to confer jurisdiction on a court-martial to try a dependent wife of a member of the United States Air Force, residing in public quarters on the air base in England at which her husband was stationed, for the crime of murdering her husband within the confines of the air base in England.

STATUTES INVOLVED

28 U. S. C. 1252, provides in pertinent part:

> Any party may appeal to the Supreme Court from an interlocutory or final judgment, decree or order of any court of the

> United States * * * holding an Act of Congress unconstitutional in any civil action, suit, or proceeding to which the United States or any of its agencies, or any officer or employee thereof, as such officer or employee, is a party.

50 U. S. C. 552, 64 Stat. 109, Article 2 of the Uniform Code of Military Justice, provides in pertinent part:

> SEC. 552. PERSONS SUBJECT TO THIS CHAPTER (ARTICLE 2).
>
> The following persons are subject to this chapter:
>
> * * * * *
>
> (11) Subject to the provisions of any treaty or agreement to which the United States is or may be a party or to any accepted rule of international law, all persons serving with, employed by, or accompanying the armed forces without the continental limits of the United States and without the following territories: That part of Alaska east of longitude one hundred and seventy-two degrees west, the Canal Zone, the main group of the Hawaiian Islands, Puerto Rico, and the Virgin Islands * * *.

STATEMENT

The appellee was tried by court-martial at a United States Air Force base in England for the murder of her husband, an Air Force sergeant, on or about March 10, 1953, at a United States

Air Force base in England (R. 1; 5). She was convicted and sentenced to imprisonment for life (R. 2, 5). Her conviction was affirmed by the Board of Review (R. 12–61). On review by the Court of Military Appeals of issues with respect to the evidence and instructions regarding insanity, the conviction was set aside and a rehearing directed, if practicable (R. 97–110).

In affirming the conviction, the Board of Review found that appellee was a person accompanying the armed forces without the continental limits of the United States and within the ambit of Article 2 (11) of the Uniform Code of Military Justice, *supra* (R. 30–32). Evidence introduced at the trial established that appellee and her children had been brought to England via military surface transport at government expense on application by her husband pursuant to permission granted by the Commanding General, Third Air Force (R. 31). She and her husband had been assigned to public quarters on the base (R. 31). She was authorized to use the facilities of the commissary and post exchange, and was entitled to receive, and did receive, medical treatment at the United States Air Force facilities at the base (R. 31).

The Board of Review also noted that at the time of the commission of the alleged offense there was in existence the United States of America (Visiting Forces) Act, 1942 (5 and 6 Geo. VI, C. 31) (Appendix, *infra*, pp. 74–84), effectuating

an agreement between the Government of the United States of America and the Government of the United Kingdom, which related to jurisdiction over members of the military and naval forces of the United States. In accordance with the provisions of that Act, the United States Base Commander executed an appropriate certificate which was delivered to an authorized representative of the British Government, setting forth that the accused was on March 10, 1953, a person subject to the military laws of the United States, and thereafter no action was taken in respect to the accused by British authorities (R. 32).

Following her conviction by the general court-martial in England, appellee was confined in the Federal Reformatory for Women, Alderson, West Virginia (R. 2). After the conviction was set aside by the Court of Military Appeals, a rehearing was ordered to be had by a court-martial convened at the Bolling Air Force Base, and appellee was transferred to Washington, D. C. (R. 8, 122). There being no suitable custodial facilities for women at any military installation in the Washington area, she was confined in the District of Columbia Jail on July 14, 1955 (R. 123).

On July 15, 1955, the civilian counsel of appellee asked the appropriate military authority to arrange for an examination of appellee as to her present mental condition and to transfer her to a suitable medical facility for this purpose (R.

124). The Superintendent of St. Elizabeth's Hospital, Washington, D. C., at the request of the military, accepted the appellee for examination (R. 124–128). Following the examination at St. Elizabeth's Hospital, appellee was returned to the District of Columbia Jail.

On November 17, 1955, appellee filed, in the United States District Court for the District of Columbia, a petition for a writ of habeas corpus challenging the validity of her detention on the ground that she was not subject to court-martial jurisdiction (R. 1–4). An order to show cause issued, and on November 22, 1955, the District Court, after hearing argument, entered an order granting the writ of habeas corpus (R. 4–5, 134). It ruled that under the principles of *Toth* v. *Quarles*, 350 U. S. 11, "the Court must conclude that in this case the petitioner appears to be entitled to a trial by the civil courts. The Court believes that it is required to grant the writ of habeas corpus in the present proceeding" (R. 132).

From the order of the District Court granting the petition for a writ of habeas corpus, appellant took this appeal under 28 U. S. C. 1252.

SUMMARY OF ARGUMENT

I

The Court has jurisdiction of this appeal because, at least in the context of this case, the appellant is an "officer or employee" of the

United States or of an agency thereof within 28 U. S. C. 1252. And this is plainly the kind of case—involving enforcement of a general federal statute by an officer acting under federal authority—for which the direct appeal under 28 U. S. C. 1252 was designed. *Fleming* v. *Rhodes*, 331 U. S. 100, 104.

1. Under familiar principles, the District of Columbia, though it is for many purposes a separate municipal corporation (cf. *Douffas* v. *Johnson*, 83 F. Supp. 644 (D. D. C.)), is also, in the general sense, an "agency" of the United States. The appellant, therefore, on this basis alone, particularly where he acts under the kind of general federal authority involved here, is among the class of officers or employees to which 28 U. S. C. 1252 applies. Cf. *United States* v. *Bramblett*, 348 U. S. 503, 509.

2. Appellant is also an agent of the United States directly. He is charged by statute with custody of prisoners of the United States, not merely of the District of Columbia. Commonly performing this role under direction of the Attorney General, he acted in this case for the Air Force. Even state officers holding federal prisoners act as federal agents in performing this function. *Randolph* v. *Donaldson*, 9 Cranch 76, 85. The appellant's federal capacity in this case is much clearer.

3. If the appellant were not an "officer or employee" or "agency" of the United States, the

decision below, ruling on the validity of the federal power which is the only issue in the case, would presumably have been neither necessary nor binding upon the United States or its other officers. This implication of the appellee's jurisdictional argument helps to demonstrate its fallacy. We think the United States is plainly represented and bound in this case through its officer and employee; by the same token, this appeal lies under 28 U. S. C. 1252.

II

Article 2 (11) of the Uniform Code of Military Justice may be sustained on either or both of two alternative grounds: (1) the power of Congress to make rules governing the armed forces and the war power, and (2) the power to make laws necessary and proper for executing the sovereign authority of the United States in international affairs. Applying only outside the United States, to crimes over which other nations would normally assert jurisdiction, this Article is a statement of the "well-established power of the military to exercise jurisdiction over * * * those directly connected with" the armed forces. *Duncan* v. *Kahanamoku*, 327 U. S. 304, 313. It deals, as in the present case, with persons who accompany, are closely connected with, and use the facilities of overseas military establishments. It thus differs markedly from an attempt to subject to court-martial jurisdic-

tion civilians who have "severed all relationship" with the military. *Toth* v. *Quarles*, 350 U. S. 11, 14. For persons, like the appellee, subject to Article 2 (11) for an alleged crime in a foreign land, the real choice is between a foreign trial and an American extraterritorial trial, not between civil and military jurisdiction within the United States. In providing for the exercise of such extraterritorial jurisdiction where the consent of the foreign sovereign could be obtained, Congress can employ courts other than those under Article III of the Constitution, at least where, as here, such courts enforce the basic guaranties of due process.

A. 1. The application of court-martial jurisdiction to civilians accompanying the armed forces has a long history. Dating at least to 1688 in England, such jurisdiction, reaching "suttlers and retailers to a camp," existed under the earliest American Articles of War. While the general extension to civilians "accompanying the armed forces" first appears in 1916, that forty-year-old provision and its present successor, Article 2 (11), are sustained by the solid ground of long history and the compelling necessities of our time. In this era of international tension, when military establishments with large civilian contingents must be deployed around the world, the rationale which formerly justified court-martial jurisdiction over "retainers [or "retailers"] to a camp" justifies such jurisdiction

over civilians "accompanying" the armed forces.

2. Repeatedly sustained by the lower courts, court-martial jurisdiction over civilians accompanying the armed forces has been recognized with apparent approval by this Court. *Duncan* v. *Kahanamoku*, 327 U. S. 304, 313; *Madsen* v. *Kinsella*, 343 U. S. 341, 345, 361. The latter case, involving a murder of her soldier-husband by a defendant wife who had accompanied the victim to occupied Germany, was closely similar in its facts to this one. Holding the wife triable by a military government court applying German law, this Court observed that she would also have been triable under Article of War 2 (d), the predecessor of present Article 2 (11). 343 U. S. at 345, 361.

While *Madsen* arose in 1949 and in occupied Germany with which we were not yet technically at peace, it seems highly relevant here. The situation of Mrs. Madsen was very like that of Mrs. Covert; both were "directly connected with" the armed forces. *Duncan* v. *Kahanamoku*, *supra*, at 313. The availability of the war power with respect to a vanquished Germany may have been more or less necessary than it was when this case arose, when hostilities in Korea were still in progress. But it is clear, in any event, that the war power need not await a state of actual war. *Silesian-American Corp.* v. *Clark*, 332 U. S. 469, 476. If, as appellee suggests, this power was required to justify court-martial juris-

diction in *Madsen*, we think it equally available to sustain Article 2 (11) in its application to the circumstances of this case.

B. Article 2 (11) of the Uniform Code finds further, and independently sufficient, constitutional basis in the settled power of Congress to confer extraterritorial jurisdiction upon non-Article III courts. In the exercise of this power, Congress is not required to provide for indictment and trial by jury. *In re Ross*, 140 U. S. 453.

The principles of *In re Ross* are squarely applicable here. By agreement and statute, England had conceded to American courts-martial the right to exercise jurisdiction over offenses by Americans which would normally be triable in English courts. Article 2 (11) plainly contemplates and confers power to exercise such jurisdiction, being in terms "[s]ubject to the provisions of any treaty or agreement to which the United States is or may be a party or to any accepted rule of international law * * *." In *Ross*, this Court upheld a conviction in an American consular court for a murder by a seaman on an American vessel in the port of Yokohama, rejecting a claim of right to indictment and jury trial. Here, with the far more detailed safeguards of the Uniform Code of Military Justice, a person directly connected with the military was properly triable by court-martial overseas. The Constitu-

tion empowers Congress to select this appropriate means of providing for trial in an American rather than a foreign tribunal. Cf. *Madsen* v. *Kinsella, supra; Neely* v. *Henkel,* 180 U. S. 109.

III

The appellee suggests that, if Article 2 (11) could validly be applied in this case, military jurisdiction over her was nevertheless abandoned when she was returned in custody to the United States, where the Court of Military Appeals has reversed her conviction and authorized a rehearing. If this argument had substance, it would mean that, in order to preserve jurisdiction under Article 2 (11), military authorities would have to keep defendants overseas—during trial, appeal, retrial, and subsequent imprisonment. There is no basis for any such requirement.

Under familiar principles, the jurisdiction asserted over appellee in England continues until the termination of proceedings against her. Military appeals and rehearings are merely a continuation of these original proceedings. Moreover, a military prisoner, as such, remains subject to military jurisdiction even after discharge and may be tried by court-martial for offenses during the imprisonment. *Carter* v. *McClaughry,* 183 U. S. 365; *Kahn* v. *Anderson,* 255 U. S. 1. *A fortiori,* the appellee remains subject to the military proceedings, not yet completed, which were properly brought against her in this case. The

Air Force has retained custody over her at all times. She ignores this plain fact in her effort to show a voluntary relinquishment of military jurisdiction.

ARGUMENT

I

THE SUPERINTENDENT OF THE DISTRICT OF COLUMBIA JAIL IS AN AGENT AND EMPLOYEE OF AN AGENCY OF THE UNITED STATES WITHIN THE PURVIEW OF 28 U. S. C. 1252

28 U. S. C. 1252, under which this appeal is taken, provides in pertinent part:

> Any party may appeal to the Supreme Court from an interlocutory or final judgment, decree or order of any court of the United States * * * holding an Act of Congress unconstitutional in any civil action, suit, or proceeding to which the United States or any of its agencies, or any officer or employee thereof, as such officer or employee, is a party.

In her motion to dismiss or affirm, the appellee, conceding that the District Court held unconstitutional an act of Congress in a civil proceeding for a writ of habeas corpus, rests her attack on the jurisdiction of the Court on the ground that appellant, Superintendent of the District of Columbia Jail, is not an employee of the United States within the purview of the statute. We believe, however, that since the Superintendent is an employee of the District of Columbia, which, at least in performing the general federal func-

tions here involved, is an agency of the United States, and since appellant is also, in the context of this case, an agent of the United States directly, this appeal is authorized under 28 U. S. C. 1252. Moreover, while jurisdictional problems may be technical and we treat the one here accordingly, it bears emphasis that this is a case of the kind to which 28 U. S. C. 1252 was plainly intended to apply. See *Fleming* v. *Rhodes*, 331 U. S. 100, 104, fn. 2, *infra*, pp. 15–16. At stake is the validity of a federal statute of general application, administered by federal officers, and properly and expectably defended in this suit by such officers. As the appellee observes (Motion to Dismiss or Affirm, p. 6), the Attorney General of the United States, through his authorized delegees—not the District of Columbia Corporation Counsel—has defended this action from the outset. Thus, the failure of the lower court to certify the cause to the Attorney General may not be attributed merely to the fact that the Attorney General, through his representative, happened only coincidentally to be already in the case (see Appellee's Motion, *supra*, p. 6, fn. 6). The true explanation is that there was no occasion for such notification because, as a matter of practical fact as well as in legal contemplation, the defendant in this case has at all pertinent times been an officer or employee of the United States defending this action for the

United States under the statute attacked by the appellee as unconstitutional.

1. The District of Columbia is a distinct municipal corporation[1] which for many purposes is not to be regarded as an agency of the United States. See, *e. g.*, *Bandy* v. *United States*, 21 C. Cls. 429; *Douffas* v. *Johnson*, 83 F. Supp 644 (D. D. C.). In the context of this case, however, performing a general federal function, and not one pertaining peculiarly to the local government, the District and its Jail Superintendent comprised a United States "agency" within 28 U. S. C. 1252. This statute speaks of a suit or proceeding "to which the United States or any of its agencies, or any officer or employee thereof, as such officer or employee, is a party." Considering the punctuation and the manifest purpose of the statute to afford the United States Government as a whole an opportunity for prompt review of constitutional issues, particularly where the challenged legislation is of general applicability,[2] the phrase "employee thereof" must refer to an employee of an agency of the United States, as well as an employee of the United States as such. And there can be no doubt

[1] *Barnes* v. *District of Columbia*, 91 U. S. 540; *Metropolitan R. Co.* v. *District of Columbia*, 132 U. S. 1; *District of Columbia* v. *Woodbury*, 136 U. S. 450; *District of Columbia* v. *John R. Thompson Co., Inc.*, 346 U. S. 100.

[2] In construing the predecessor statute of August 24, 1937, c. 754, 50 Stat. 752, 28 U. S. C. (1940 ed.) 349a, this Court said, in *Fleming* v. *Rhodes*, 331 U. S. 100, 104: "The Congress intended prompt review of the constitutionality of

that appellant can properly be called an employee of an agency of the United States.

There is nothing strange in treating the District of Columbia as an agency of the United States for the purposes which concern us here. In describing the relationship of the District of Columbia Government to the Government of the United States, this Court has repeatedly adverted to the agency concept implicit in every municipal corporation. In the *Metropolitan R. Co.* case, *supra*, p. 8, it said:

> All municipal governments are but *agencies* of the superior power of the State or government by which they are constituted, and are invested with only such subordinate powers of local legislation and control as the superior legislature sees fit to confer upon them. The form of those *agencies* and the mode of appointing officials to execute them are matters of legislative discretion. [Emphasis added.]

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federal acts." The Court quoted from H. Rep. No. 212 (75th Cong., 1st Sess.), p. 2, the following:

"The importance to the Nation of prompt determination by the court of last resort of disputed questions of the constitutionality of acts of Congress requires no comment."

And from S. Rep. No. 963 (75th Cong., 1st Sess.), pp. 3–4:

"The United States is not excluded by the principle thus stated, from drawing the judicial power to its proper assistance either as an original party, or as an intervenor, when, in private litigation, decision of the constitutional question may affect the public at large, may be in respect of matters which by the Constitution are entrusted to the care of the Nation, and concerning which the Nation owes a duty to all the citizens of securing to them their common rights."

In *District of Columbia* v. *Woodbury, supra,* p. 452, the Court, discussing the Board of Public Works of the District of Columbia, referred to the agency aspect of municipal corporations when it wrote:

> * * * Although that Board was dependent upon both Congress and the Legislative Assembly of the District, and was the *hand and agent* both of the United States and of the District, it was held to be the representative and a part of the municipal corporation created by the act of 1871 * * *. [Emphasis added.]

And the recent discussion in *District of Columbia* v. *Thompson Co., supra,* p. 109, makes it clear that the agency concept implicit in municipal corporations is applicable to the Government of the District of Columbia when it is acting in behalf of the Government of the United States. Similarly, the court in *Penn Bridge Co.* v. *United States,* 29 App. D. C. 452, 457, said:

> * * * The government of the District of Columbia is simply an agency of the United States for conducting the affairs of its government in the Federal District * * *.

This Court's recent decision in *United States* v. *Bramblett,* 348 U. S. 503, is instructive here in illustrating how the word "agency", like so many others in the law, takes color from its context. There, the Court was concerned with the criminal statute punishing false statements

in matters within the jurisdiction of "any agency of the United States." In this connection the definition of the word "agency" in 18 U. S. C. 6 was examined. That section provides:

> * * * The term "agency" includes any department, independent establishment, commission, administration, authority, board or bureau of the United States or any corporation in which the United States has a proprietary interest, unless the context shows that such term was intended to be used in a more limited sense.

The Court held that the context of the problem required "an unrestricted interpretation" of the criminal statute. 348 U. S. at 509. Here, we may note the general definition of agency for the purpose of Title 28 in 28 U. S. C. 451, which is identical with that of 18 U. S. C. 6, quoted above. And in the present context, it seems clear that the term should apply in its fullest sense in this case, which is one of the very type for which Congress designed the direct appeal provisions of 28 U. S. C. 1252.

Congress, in exercise of its constitutional power under Article I, Section 8, Clause 17, over the seat of government of the United States, included the District of Columbia within the definition of "agency" in the Legislative Reorganization Act of 1949 (63 Stat. 203, 205).[3] Pursuant to the authority granted him under this Act,

[3] 5 U. S. C. 133z to 133z–15.

the President promulgated Reorganization Plan No. 5 of 1952, providing for the reorganization of the Government of the District of Columbia.[4] Under this plan the functions of the Board of Public Welfare, which had "complete and exclusive control and management" of the Washington Asylum and Jail,[5] together with the functions of the officers thereof, were transferred to the Board of Commissioners of the District of Columbia. Of the three Commissioners comprising the Board, two are appointed by the President with the advice and consent of the Senate[6] and one, the Engineer Commissioner, is appointed by the President from the ranks of the Corps of Engineers of the United States Army.[7] The Commissioners, authorized to delegate the functions assigned to them by the Reorganization Plan, issued District of Columbia Reorganization Order No. 34, effective June 21, 1953, whereby a Department of Corrections under a Director was created and charged with responsibility for the maintenance of the District of Columbia Jail.[8] Appellant, as Superintendent of the Jail, is responsible to the Director of the Department of Corrections and, through

[4] 3 C. F. R. 1952 Supp., p. 124.

[5] D. C. Code, 1951 ed. 3–106; 24–409.

[6] D. C. Code, 1951 ed. 1–201.

[7] D. C. Code, 1951 ed. 1–202, 203.

[8] See Reorganization Order No. 34, Appendix to Title 1 of Supp. III of D. C. Code, 1951 ed., p. 34.

him, to the Commissioners. The Commissioners are officers of the United States by virtue of Article II, Section 2 of the Constitution, and the Department of Corrections, like the Board of Public Works in *District of Columbia* v. *Woodbury, supra,* would normally be termed an agency of the United States. There is therefore good ground for concluding that this proceeding against appellant, their employee, is within 28 U. S. C. 1252, particularly since the purposes of that statute would be fully served by such a holding.

2. Appellant is also an agent of the United States directly. His functions as Superintendent of the District of Columbia Jail mark him as a custodial agent of the United States. Under the statutes he is obliged to accept as prisoners for safekeeping those persons assigned to him, whether they were convicted in federal courts for offenses against the United States or by courts-martial for military offenses. His duty to accept persons convicted of offenses against the United States arises under Section 410 of Title 24, D. C. Code, 1951 ed., which provides:

> The Board of Public Welfare is hereby authorized and directed to receive and keep in the Washington Asylum and Jail all prisoners committed thereto for offenses against the United States.[9]

[9] Under Reorganization Plan No. 5, *supra*, p. 19, the authority of the Board of Public Welfare was transferred to the Board of Commissioners of the District of Columbia.

When appellant exercises his power to detain federal prisoners, he does so under the direction of the Attorney General by virtue of Section 425 of Title 24, D. C. Code, 1951 ed., which provides:

> All prisoners convicted in the District of Columbia for any offense, including violations of municipal regulations and ordinances and Acts of Congress in the nature of municipal regulations and ordinances, shall be committed, for their terms of imprisonment, and to such types of institutions as the court may direct, to the custody of the Attorney General of the United States or his authorized representative, who shall designate the places of confinements where the sentences of all persons shall be served. The Attorney General may designate any available, suitable, and appropriate institutions, whether maintained by the District of Columbia Government, the federal government, or otherwise, or whether within or without the District of Columbia. The Attorney General is also authorized to order the transfer of any such person from one institution to another if, in his judgment, it shall be for the well-being of the prisoner or relieve overcrowding or unhealthful conditions in the institution where such prisoner is confined, or for other reasons. [July 15, 1932, ch. 492, § 11, as added June 6, 1940, 54 Stat. 244, ch. 254, § 8.]

Not only is appellant directed by these code sections to act under instructions of the Attorney

General in detaining prisoners,[10] but the Attorney General is empowered to give such instructions by 18 U. S. C. 4082, which provides in part:

> Persons convicted of an offense against the United States shall be committed, for such term of imprisonment as the court may direct, to the custody of the Attorney General of the United States or his authorized representative, who shall designate the places of confinement where the sentences shall be served.
>
> The Attorney General may designate any available, suitable, and appropriate institutions, whether maintained by the Federal Government or otherwise, or whether within or without the judicial district in which the person was convicted.

* * * * *

Since "[c]rimes committed in the District are not crimes against the District, but against the United States" (*Metropolitan R. Co.* v. *District of Columbia,* 132 U. S. 1, 9), all offenders convicted in the District of Columbia are, by virtue of the quoted section, in the custody of the Attorney General. Thus it follows that, even as to the District of Columbia prisoners in its own jail, appellant acts under and for the Attorney General as

[10] The duties imposed on appellant under D. C. Reorganization Order No. 34, *supra*, fn. 8, are principally concerned with the maintenance and care of the physical properties of the jail. Compare Section 420 with Section 421, both of Title 24, D. C. Code, 1951 ed.

agent of the United States in regard to their custodial detention.

The fact that appellee was a military prisoner convicted by court-martial does not alter appellant's status as agent of the United States in respect to her safe-keeping. In this case appellant is not less an agent of the United States when he detains a prisoner on request of the Air Force than when he detains a prisoner on direction of the Attorney General; both, in their own spheres, equally represent the United States.

Appellant was authorized to receive custody of appellee from the Air Force on its request and to hold her in detention under the authority of 18 U. S. C. 4083, which states:

> Persons convicted of offenses against the United States or by courts-martial and sentenced to terms of imprisonment of more than one year may be confined in any United States penitentiary.

The Air Force, in requesting appellant to accept custody of appellee, acted under the authority of Article 10, Uniform Code of Military Justice (50 U. S. C. 564), which provides in part:

> Any person subject to this chapter charged with an offense under this chapter shall be ordered into arrest or confinement, as circumstances may require * * *.

Since the Air Force had no adequate or suitable facilities for the detention of women prisoners in the Washington, D. C., area in which to hold

appellee pending her rehearing at Bolling Air Force Base, it utilized the federal civilian detention institution in the District. Hence, in detaining appellee, appellant, who normally restrains prisoners under directions from the Attorney General, acted in this case on request of the Air Force.

That appellant, though an employee of the District of Columbia, is an agent of the United States when he detains federal prisoners is confirmed by the rulings of courts in analogous cases. For example, a state or local official who holds a federal prisoner for federal officers acts as a federal agent in performing this function. This Court, in *Randolph* v. *Donaldson*, 9 Cranch 76, 86, stated:

> * * * For certain purposes, and to certain intents, the state jail, lawfully used by the United States, may be deemed to be the jail of the United States, and that keeper to be keeper of the United States.

This case was followed in *United States* v. *Hoffman*, 13 F. 2d 269, 272 (C. A. 2), where the court wrote:

> * * * The state jail is to be deemed the jail of the United States for this purpose. The keeper of the jail is the keeper of the United States. Those charged with responsibility for the execution of the writs of the United States court are to that extent and for that purpose officers of the United States court, and are subject to

punishment for contempt for disobedience or disregard of the warrants or orders committing such prisoners to their custody. *Randolph* v. *Donaldson*, 9 Cranch, 77, 863 L. Ed. 662; *Swepston* v. *United States*, 251 F. 205, 163 C. C. A. 361; *In re O'Rourke* (D. C.) 251 F. 768; *Ex parte Shores* (D. C.) 195 F. 627; *In re Birdsong* (D. C.) 39 F. 599; *Servis* v. *Marsh* (C. C.) 38 F. 794.

See also *In re Ross*, 140 U. S. 453, 454–455, 459. Appellant, who can be legally charged by the Attorney General with responsibility for the safekeeping of federal prisoners, had, in this case, responsibility for the detention of appellee, a federal military prisoner. This obligation rendered appellant, by operation of law, an agent of the United States.

Even counsel for appellee has by his actions acknowledged that appellant was an agent for the Air Force. By a letter addressed to the commanding officer of the Bolling Air Base, dated July 15, 1955 (at the time appellee was in the District of Columbia jail), requesting the military authorities to transfer appellee to a suitable medical facility for observation and examination as to her present mental condition (R. 124), counsel for appellee implicitly acknowledged that appellant was acting as agent for and under instructions of the United States Air Force. The Air Force, by negotiating with the Superintendent of St. Elizabeths Hospital for examination

of appellee and causing her transfer to the hospital (R. 124–128), demonstrated that it did control the custody of appellee through the agency of the appellant. As a practical matter, all parties concerned with the custody of appellee deemed her to be a federal military prisoner, and viewed appellant as an agent of the United States in detaining her.

3. Finally, the implications of the appellee's contrary view further buttress our conclusion that, at least in the context of this case, the appellant must be viewed as an "officer or employee" or "agency" of the United States. Unless this is so, it would appear difficult to find a basis for holding the United States or any of its officers bound by the decision below. On the appellee's view, there was no occasion to reach the issue of federal power in this case because appellant does not exercise federal power. And though the District Court ruled on this question, the only one the parties have ever considered to be involved, the issue—under appellee's theory—would remain untried as to any proper federal defendant whose presence could conclude it.

We would not even suggest that the constitutionality of the appellee's trial under Article 2 (11) cannot be finally determined, against the United States and all its agents, in the present litigation. We urge the contrary. The reasoning which requires our conclusion leads equally to the

conclusion that this is a case to which the direct appeal provisions of 28 U. S. C. 1252 apply.[11]

II

ARTICLE 2 (11) OF THE UNIFORM CODE OF MILITARY JUSTICE IS A VALID EXERCISE OF THE POWER OF CONGRESS TO MAKE RULES FOR THE GOVERNMENT AND REGULATION OF THE LAND AND NAVAL FORCES, THE WAR POWER, AND THE POWER TO MAKE ALL LAWS NECESSARY AND PROPER FOR CARRYING INTO EXECUTION THE SOVEREIGN AUTHORITY OF THE UNITED STATES TO MAINTAIN RELATIONS WITH OTHER SOVEREIGNTIES

Article 2 (11) of the Uniform Code of Military Justice (*supra*, p. 3) confers authority upon

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[11] It may be noted that the appellant on December 19, 1955, filed a notice of appeal from the District Court's decision to the Court of Appeals for the District of Columbia Circuit (*Reid* v. *Covert*, C. A. D. C. No. 13,228). On March 16, 1956, a preliminary record was filed in the Court of Appeals consisting of the notice of appeal, docket entries, and judgment of the District Court, and counsel moved for an extension of time to file a complete record to fifteen days after disposition of the present appeal to this Court. On March 22, 1956, the appellee filed an objection to this motion, arguing that the appeal to this Court divested the Court of Appeals of jurisdiction. We think it clear, however, that appellee cannot prevail on both arguments—*i. e.*, in urging that appeal does not lie to this Court but that the attempt to bring it here has destroyed the jurisdiction of the Court of Appeals as well.

Believing that appeal properly lies here under 28 U. S. C. 1252, we have nevertheless undertaken to protect the Government's interests by preserving our appeal to the Court of Appeals. If we have erred in our view on this issue, this Court may see fit to treat our Statement as to Jurisdiction as a petition for certiorari before judgment or to entertain such a petition which can be promptly filed if there appears to be any occasion therefor. Cf. *Stainback* v. *Mo Hock Ke Eok Po*, 336 U. S. 368, 371.

courts-martial of the armed forces of the United States to try persons serving with, employed by, or accompanying those forces outside the continental limits of the United States and certain of its territories. Unlike the provision invalidated in *Toth* v. *Quarles,* 350 U. S. 11, which applied to civilians who had "severed all relationship" (p. 14; see also p. 13) with the armed forces, the Article here in question is part of the "well-established power of the military to exercise jurisdiction over * * * those directly connected with such forces" (*Duncan* v. *Kahanamoku,* 327 U. S. 304, 313; see also *Madsen* v. *Kinsella,* 343 U. S. 341, 345, 361). In addition, as we shall show (*infra,* pp. 48–65), because the real choice in the situation to which Article 2 (11) applies is between trial by an American court and trial by a foreign court, this statute finds independently sufficient basis in the settled power of Congress to provide for the exercise of such extraterritorial jurisdiction by the United States through tribunals other than those created under Article III of the Constitution (*In re Ross,* 140 U. S. 453).

The twentieth-century problems which gave rise to Article 2 (11) and its forty-year-old precursor (Article 2 (d) of the Articles of War of 1916) are familiar ones. In the troubled circumstances of our times our national security requires that we station in many foreign nations large military and

naval establishments. Sizable civilian contingents closely accompany, live with, and form integral parts of these establishments. Substantial numbers of highly trained specialists and technicians, whose skills are not available in the uniformed services and cannot be economically supplied by training those in uniform, are essential to the daily problems of maintenance and administration arising from the intricate technology of modern warfare. Equally significant to the armed forces is the need to sustain the morale of troops stationed in many and remote corners of the earth—morale which, even apart from the calls of humanity, promotes stability of the complement by permitting longer periods of overseas assignment and encourages reenlistments. To this end, the services have transported at military expense hundreds of thousands of dependents, and currently there are some 250,000 dependents abroad. This policy serves an obviously sound military purpose. These dependents and the 20,000 technicians and other employees overseas give rise to the questions of discipline and international harmony to which Article 2 (11) is addressed.

Confronting these questions, the Congress which enacted and the President who approved Article 2 (11), carrying forward what had formerly been Article of War 2 (d), had to deal with a complex of concerns. It was evident that these

large numbers of civilians could not and would not be free of all legal sanctions governing their conduct. For many crimes—like the alleged murder here involved—the foreign country where they were stationed would probably insist on trying them in its own tribunals according to its own law, at least in the absence of agreement or action to achieve another result. The security, safety and integrity of the military establishments located abroad, which are plainly liable to possible injury by the many civilians living and working intimately with those in uniform, were significant and special concerns of this country, more so than of the friendly state receiving our forces. Misconduct by such civilians abroad, not less than misconduct by those in service, could cause international friction in areas where harmony and cooperation are of the highest importance.

Weighing such considerations, Congress and the President reenacted, and adapted to the international scene (see *infra*, pp. 49–61), the solution now embodied in Article 2 (11). As we have stated, we argue that two independent lines of authority sustain this reasonable provision: *first*, the combination of the power "To make Rules for the Government and Regulation of the land and naval forces" (Constitution, Art. I, Sec. 8, Cl. 14), the war power (*id.*, Cl. 11), and the power to make laws "necessary and proper" for the execution of these powers (*id.*, Cl. 18); *second*, the well-settled power to exercise extraterritorial

jurisdiction, through non-Article III courts, over crimes committed abroad by Americans. The result for persons like appellee is a trial by fellow-citizens, safeguarded by basic guaranties of due process and American procedure (*Burns* v. *Wilson*, 346 U. S. 137, 142–143), rather than the likely alternative of a trial in a foreign court under foreign auspices. That choice, we submit, lay well within the power of Congress under the Constitution.

A. ARTICLE 2 (11) IS A VALID EXERCISE OF THE POWER TO MAKE RULES GOVERNING THE ARMED FORCES AND OF THE WAR POWER

Appellee was overseas because her husband, a member of the United States Air Force, was sent abroad in fulfillment of American military commitments and because the American military authorities had determined that it furthered the morale of the armed forces stationed abroad to permit their families to accompany them. Cf. *Madsen* v. *Kinsella*, 343 U. S. 341, 345, 361. Plans for and the cost of her transportation to England had been arranged and provided by the Air Force. She travelled by military surface transport. After arrival in England, appellee and her husband were assigned public quarters and she was issued appropriate authorization for commissary and post exchange privileges. She was accorded the use of, and did use, military medical facilities (R. 31). In the eyes of this country, and of the foreign nations in which our armed forces are stationed, the civilians described

in Article 2 (11) are part of the American military contingent abroad. Their actions directly affect the reputation, the status, and the discipline of our armed forces overseas, as well as their continued acceptability to the host governments. It is, therefore, fitting that civilians who accompany the armed forces to foreign duty stations be subject to discipline under American military law. That is the status which Congress deliberately elected to give them. A constitutional basis for this legislative choice is furnished by Article I, Section 8, Clause 14, together with the "Necessary and Proper" Clause and the general war power. History and judicial precedent lend their weight in support.

1. The concept of subjecting to military jurisdiction civilians accompanying armies is not new. The Articles of War of King James II of England, promulgated in 1688, contemplated the trial and punishment of civilians by courts-martial when it provided: [12]

ART. XLV

No Officer or Soldier shall be a Victualler in the Army upon pain of being punished at discretion.

ART. XLVI

No Victualler or seller of Beer, Ale, or Wine belonging to the Army, shall Entertain any Soldier in his House, Booth, Tent,

[12] Winthrop, *Military Law and Precedents*, 2d ed., Reprint 1920, p. 926.

> or Hutt after the Warning-Piece, Tattoe, or Beat of the Drum at night, or before the Beating of the Reveilles in the morning; nor shall any Soldier within that time be any where but upon his Duty, or in his Quarters, upon pain of Punishment both to the Soldier and Entertainer at the Discretion of a Court-Martial.

In the British Articles of War of 1765, which served as a model for the early American Articles, there appeared Article XXIII of Section XIV, which provided:[13]

> All Suttlers and Retainers to a Camp, and all persons whatsoever serving with Our Armies in the Field, though not inlisted Soldiers, are to be subject to orders, according to the Rules and Discipline of War.

The First Articles of War of the United States, enacted by the Continental Congress on June 30, 1775, provided:[14]

> XXXII. All suttlers and retailers to a camp, and all persons whatsoever, serving with the continental army in the field, though not inlisted soldiers, are to be subject to the articles, rules, and regulations of the continental army.

A similar provision was contained in the 1776 Articles of War[15] which remained in effect, with

[13] Winthrop, p. 941.
[14] Winthrop, p. 956.
[15] Winthrop, p. 967 (Art. 23).

irrelevant changes, until almost two decades after the adoption of the Constitution.[16]

Against this background, the constitutional provision for the government and regulation of the armed forces must be read as necessarily sanctioning the trial by court-martial of certain classes of civilians intimately related to the armed forces. Cf. *Dynes* v. *Hoover*, 20 How. 65, 79 ("Congress has the power to provide for the trial and punishment of military and naval offenses in the manner then and now, practiced by civilized nations"). It is significant, too, that every successive reenactment of the Articles of War, including the Uniform Code of Military Justice of 1950, has contained an article making civilians "serving" with the army subject to military law.

The word "acompanying"—as distinguished from "serving"—which now appears in Article 2 (10) and (11) of the Uniform Code of Military Justice was first introduced into military law during the general revision of the Articles of War in 1916. Major General Enoch H. Crowder, then The Judge Advocate General, who had urged this revision, after explaining to the House Committee

[16] Winthrop, p. 99, n. 94, states that "Members of the families of soldiers or officers, commorant with the army, would be amenable as camp-followers. Simmons § 71, note, cites the case of Hannah Fitchet, a soldier's wife, convicted of manslaughter by a general court-martial in India in 1825. That the *wife of an officer* may be triable by court-martial as a camp-follower, see Hough, (P.) [Precedents in Military Law] 629."

on Military Affairs that it was intended thereby to include camp followers and persons serving with or accompanying the Army in the field, said:[17]

> There is nothing new in the article in subjecting these several classes to the provisions of article 65. It is a jurisdiction which has always been exercised. When any person joins an army in the field and subjects himself by that act to the discipline of the camp he acquires the capacity to imperil the safety of the command to the same degree as a man under the obligation of an enlistment contract or of a commission.

Following the failure of the revision in the 62d and 63d Congresses, General Crowder appeared before the Senate Committee on Military Affairs in the 64th Congress and testified:[18]

> In the present condition of our Articles of War "retainers to the camp" (i. e., officers' servants, newspaper correspondents, telegraph operators, etc.) and "persons serving with the armies in the field" (i. e., civilian clerks, teamsters, laborers, interpreters, guides, contract surgeons, officials, and employees of the provost marshal general's department, officers and men employed on transports, etc.) are made subject to the Articles of War only during the

[17] Hearings before the House Committee on Military Affairs, 62d Cong., 2d Sess., on H. R. 23628, p. 61.

[18] S. Rep. No. 130, 64th Cong., 1st Sess., pp. 37–38.

period and pendency of war and while in the theater of military operations. A number of persons who manage to accompany the Army, not in the capacity of retainers or of persons serving therewith, are not included. They constitute a class whose subjection to the Articles of War is quite as necessary as in the case of the two classes expressly mentioned. Accordingly the article has been expanded to include also persons accompanying the Army. The existing articles are further defective in that they do not permit the disciplining of these three classes of camp followers in time of peace in places to which the civil jurisdiction of the United States does not extend and where it is contrary to international policy to subject such persons to the local jurisdiction, or where, for other reasons, the law of the local jurisdiction is not applicable, thus leaving these classes practically without liability to punishment for their unlawful acts under such circumstances—as, for example, where our forces accompanied by such camp followers are permitted peaceful transit through Canadian, Mexican, or other foreign territory, or where such forces so accompanied are engaged in the nonhostile occupation of foreign territory, as was the case during the intervention of 1906–7 in Cuba.

Congress adopted the changes suggested by General Crowder by enacting Article 2 (d) of the Articles of War of 1916, which provided:

> (d) All retainers to the camp and all persons accompanying or serving with the armies of the United States without the territorial jurisdiction of the United States, and in time of war all such retainers and persons accompanying or serving with the armies of the United States in the field, both within and without the territorial jurisdiction of the United States, though not otherwise subject to these articles.[38]

After full consideration by an eminent committee of experts and by Congress, Article 2 (11) of the present Uniform Code—reflecting the fact that, while there is no war, there is a world situation far short of perfect "peace," requiring large military commitments across the world—carried forward the provision that civilians "accompanying the armed forces" overseas should be subject to court-martial jurisdiction.

In this century a broadened class of civilians has come to have the kind of direct relationship to the military which is familiar today. Congress dealt with the problems these changed circumstances create in Article 2 (d) of the 1916 Articles of War, which has become Article 2 (11) of the Uniform Code.[39] The rationale which in 1776 made "retailers to a camp" subject to court-martial jurisdiction—their close connection with

[38] The 1916 provision was reenacted in 1920, 41 Stat. 787.

[39] It should be noted that appellee agrees (Motion to Dismiss or Affirm, pp. 7–10) that such civilians could always be tried by court-martial in time of war or actual hostilities. See also *infra*, pp. 40–44.

the army and direct effect on military discipline—applies to civilians accompanying the army overseas in the circumstances of today. The inclusion of such civilians as subject to military jurisdiction is a recognition by the military and by Congress that in 1916, and even more in 1950, the nature of the American army and of American military commitments had changed from the situation that existed in 1776. Congress recognized in 1916 that the United States was no longer an isolated nation insulated from Europe and Asia by ocean barriers, but that our armed forces, consisting of military and civilian personnel, might be deployed throughout the world even in time of peace. Congress understood that, should world events develop to necessitate a global disposition of the American armies, every civilian who accompanied them would be an unofficial emissary of the United States to some foreign land, adding his contribution to the overall impression created by our troops stationed there and influencing the conduct of those servicemen. It was deemed necessary and proper that such accompanying civilians who went abroad under military auspices, commingled with military personnel and enjoying the privileges of military facilities, should, because of their great potential impact on military discipline, be subject to military law. In 1950, when the necessity of keeping American armies overseas for lengthy periods was clearly envisaged, Congress reaffirmed

its recognition that the classes of civilians who would, in both American and foreign eyes, be deemed part of the American military contingent abroad includes, not only civilians working with the army; but dependents who are, in terms of contemporary realities, an equally necessary and intimate part of our military contingent overseas.

The legislative history of Article 2 (11) reveals that Congress understood that dependent wives and children of servicemen stationed abroad, who accompany their husbands and fathers from place to place, would fall within the ambit of the term "accompanying" and be subject to military law. This effect of Article 2 (11) was pointed out to the Subcommittee of the Committee on Armed Forces during its hearings on H. R. 2498 by Mr. Larkin, General Counsel of the Department of Defense, in the following exchange with Congressman Elston and Mr. Smart:[21]

> Mr. ELSTON. It would not cover the families of soldiers, would it?
>
> Mr. LARKIN. *I think it would, if they were dependents.*
>
> Mr. ELSTON. Well——
>
> Mr. LARKIN. If they were living with him in some quarters furnished and moved from place to place with him, based on the service——
>
> * * * * *

[21] Hearings on H. R. 2498, 81st Cong., 1st Sess., before Subcommittee of the Committee on Armed Services of the House of Representatives, pp. 876–877.

Mr. BROOKS. I just received today a letter from a mother saying she was going over to visit her daughter who is the wife of an officer in Germany. When she arrives over there the court, that is the military court, would have concurrent jurisdiction under this code with the court-martial in the trial of the case if one should arise, would they not?

Mr. LARKIN. The occupation court would have jurisdiction over her if she committed any crimes.

Mr. SMART. I do not see where that particular person would come under the code. She is not serving with, employed by, or accompanying the forces.

Mr. LARKIN. That is right.

Mr. SMART. She would not, in any case, in my opinion, be subject to this code. *Whereas the family of a soldier, be it officer or private, does accompany him and he certainly is part of the forces.* I do not think it could be considered that this provision would be broad enough to cover the relative who goes for a mere visit. [Emphasis added.]

2. The power of Congress to provide for trial by court-martial of civilians accompanying our armed forces overseas has been recognized by this Court as "well-established" (*Duncan* v. *Kahanamoku*, 327 U. S. 304, 313; and see *Madsen* v. *Kinsella*, 343 U. S. 341, 345, 361), and has been repeatedly enforced by the lower federal courts. *Hines* v. *Mikell*, 259 Fed. 28 (C. A. 3), certiorari

denied, 250 U. S. 645; *Perlstein* v. *United States*, 151 F. 2d 167 (C. A. 3), certiorari granted, 327 U. S. 777, certiorari dismissed, 328 U. S. 822; *United States ex rel. Mobley* v. *Handy*, 176 F. 2d 491 (C. A. 5), certiorari denied, 338 U. S. 904; *Rubenstein* v. *Wilson*, 212 F. 2d 631 (C. A. D. C.); *Ex parte Gerlach*, 247 Fed. 616 (S. D. N. Y.); *Ex parte Falls*, 251 Fed. 415 (D. N. J.); *Ex parte Jochen*, 257 Fed. 200 (S. D. Tex.); *In re Berue*, 54 F. Supp. 252 (S. D. Ohio); *Grewe* v. *France*, 75 F. Supp. 433 (E. D. Wis.); *United States* v. *Burney*, U. S. C. M. A. No. 7750, decided March 30, 1956 (reprinted in Appendix B to the Government's brief in No. 713); *Krueger* v. *Kinsella*, 137 F. Supp. 806, pending on certiorari, No. 713, this Term. We recognize, of course, that this Court's pronouncements on the subject—both in *Duncan*, preceding the Uniform Code, and in *Madsen*, which followed—are, strictly speaking, dicta. We invoke them, nevertheless, because they appear to be considered declarations on matters of grave import and they represent, in our judgment, correct statements of the governing constitutional rule.

The facts in *Madsen* v. *Kinsella*, *supra*, with distinctions soon to be noted, were strikingly similar to the ones in this case. See 343 U. S. at 343–344. There, as here, "a civilian dependent wife of a member of the United States Armed Forces," living in quarters furnished by military authorities and using facili-

ties furnished by the military for such persons, was charged with the murder of her husband. The differences from this case were (1) that, at that time (1949), there was still no treaty of peace with Germany, and (2) that Germany, where the events occurred, was occupied, not friendly territory like England in this case, which consented to the presence of our troops and those accompanying them and consented to the exercise of American military jurisdiction over such persons. On those facts, while holding that Mrs. Madsen could be tried by an American occupation court applying German law, this Court stated unequivocally that she could also have been tried by court-martial under Article of War 2 (d), the precursor of present Article 2 (11). 343 U. S. at 345, 361.

Arguing that Article 2 (11) is so plainly invalid that the attempt to sustain its enactment is unsubstantial, the appellee here dismisses *Madsen* v. *Kinsella* (Motion to Dismiss or Affirm, p. 10, fn. 9) as "a war power case involving occupied territory * * * [which] is therefore irrelevant to the present problem." But the rigid circumscription of the war power and the negation of the rationale of the *Madsen* opinion implicit in that argument find no support either in constitutional precedent or in the practical realities with which we are concerned.

First, as a factual matter, there is no substantial distinction between Mrs. Madsen and the

context of her crime, on the one hand, and Mrs. Covert's case, on the other. Both were dependent wives accompanying their soldier husbands, using housing and other facilities supplied by the military. Both were in a real sense part of the military establishment; both presented problems of very similar concern to the military commands in which they lived. As to the broader context, the questions of war and peace and occupation to which the appellee refers, it would be hard to say whether the difficulties of dealing with a prostrate Germany prior to a formal declaration of peace presented a more or less fitting occasion for application of the war power than did the continuing tensions of war and threatened war which formed the background and basis for Mrs. Covert's sojourn in England. See also *infra*, pp. 49 *ff.*[22]

In any event, it seems sufficient to recall that the war power is not confined in its operation to periods when the nation is engaged in formal war or actual hostilities. *Ashwander* v. *Tennessee Valley Authority*, 297 U. S. 288, 326, 327–328; *Silesian-American Corp.* v. *Clark*, 332 U. S. 469, 476; *United States* v. *City of Chester*, 144 F. 2d 415, 418–419 (C. A. 3). It will not be denied, we

[22] It will be recalled that the Korean conflict, at least very like a war, had not ended at the time of the alleged murder in this case, March 10, 1953. Cf. *United States* v. *Bancroft*, 3 U. S. C. M. A. 3; *United States* v. *Ayres*, 4 U. S. C. M. A. 220.

think, that the threat of war and the effort to insure peace by preparations for war were very much in the minds of those who enacted both the 1916 Article of War 2 (d) and Article 2 (11) of the Uniform Code of Military Justice. There is no basis for the suggestion that the war power may not be invoked in support of Article 2 (11)—which can only operate abroad—and its application in the circumstances of this case. As the *Madsen* case shows, the general war power which sustains our farflung establishments overseas and our complex of foreign defensive measures likewise has its role in the government and control of civilians who accompany the forces on these missions abroad.

When the facts of war and peace in 1956 are considered, the appellee's curt dismissal of the war power (in its combination with Article I, Section 8, Clause 14, and the "Necessary and Proper" Clause) is seen to be erroneous; and her reliance upon the eminent authority of Colonel Winthrop (Motion to Dismiss or Affirm, p. 8) fails for the same reason. Writing at the end of the last century, Colonel Winthrop recognized the propriety of trying by court-martial civilians, including dependents, accompanying the armed forces in wartime. *Military Law and Precedents*, p. 99, fn. 94, quoted *supra*, fn. 16, p. 33. To be sure, he drew the constitutional line at the end of war (Winthrop, p. 107). But the world about which Colonel Winthrop wrote no longer exists.

The military situation today, with military bases around the world heavily populated by accompanying civilians, is one he neither saw nor appears to have foreseen. His concern was solely with civilians *in the United States* and with the extension of court-martial jurisdiction over *them*. His treatise gives no real indication of his views as to court-martial jurisdiction over civilians with the armed forces overseas in the circumstances which arose after World War II.[23] One can surmise from his discussion of constitutionality that Winthrop would not have been as hostile to Article 2 (11) as appellee believes.

We submit, therefore, that the lower court cases sustaining the exercise of court-martial power over civilians accompanying the armed forces overseas are very much in point here, even though they may have arisen in time of war or in occupied territory, for formal war does not exhaust the occasions for the exercise of the war power. By the same token, this Court's expressions approving this conclusion in *Duncan* and *Madsen* are more nearly controlling than the recent decision in *Toth* v. *Quarles*, 350 U. S. 11. Toth, months before his arrest for trial by court-martial, had "severed all relationship with the military"

[23] Similarly, it seems clear that the rulings of The Judge Advocate General cited by appellee (Motion to Dismiss or Affirm, p. 8) dealt with civilians *within the United States*, who are normally protected by the Sixth Amendment's guaranty of trial by jury.

(350 U. S. at 14) and had returned to the United States to live as a full-fledged civilian. Mrs. Covert, like other civilians accompanying the armed forces and held triable by court-martial in cases this Court has cited with approval, was still "directly connected with such forces" (*Duncan* v. *Kahanamoku, supra,* at 313 [24]) at their station in a foreign land. Moreover, in *Toth*, the Court stressed that it would have been feasible and constitutional to provide for trial in the federal courts in the United States of ex-servicemen like the defendant there. 350 U. S. at 20–21. Here, the existence of such an alternative is less likely and would, in any event, not detract from the validity of the choice Congress made. For in waiving its right to exercise the jurisdiction it would normally claim for itself, a foreign nation has an obvious interest in prompt and certain trial, usually within its own borders, of offenses alleged to have occurred there.[25] And, as we show

[24] Citing, in fn. 7, *Ex parte Gerlach, supra; Ex parte Falls, supra; Ex parte Jochen, supra; Hines* v. *Mikell, supra.*

[25] Compare the "understanding" of the British, in concluding the agreement here involved, that for offenses against their civilian population United States forces would provide a prompt and open (except for security cases) trial close to the spot in the United Kingdom where the offense was alleged to have occurred. Note from his Majesty's Government, Appendix, *infra,* p. 80. While the alleged offense in this particular case was not against a British civilian, the point remains that Great Britain or other foreign countries would probably be more reluctant to yield their normal right to exercise jurisdiction had Congress provided, instead of Article 2 (11), for trial of such cases in the United

below (pp. 48–65), Congress had long and ample precedent for exercising such extraterritorial jurisdiction through courts created otherwise than under Article III of the Constitution.

Summarizing to this point, we submit that the extension of court-martial jurisdiction to civilians accompanying the armed forces overseas, including dependents, is warranted by both practical considerations and constitutional doctrine. It is not an attempt to gain power for the military at the expense of American civilian law. It is, rather, a recognition of the realities of present day American military commitments and the requirements of our national security in areas where American civilian law is not the governing law. It postulates that at the present time not only weapons of war, but the whole area of defense and the whole system of military arrangements, are very different from those that existed before 1916. In today's circumstances, civilians accompanying the armed forces overseas, including dependents, are an intimate part of the American military contingent abroad. Just as it was a reasonable regulation of the armed forces in 1776 to provide for court-martial jurisdiction over civilians dealing with the armed forces in

States. The suggestion that cases involving foreign civilians as victims could be tried by court-martial overseas would hardly help this appellee. There is no constitutional basis for suggesting that the scope of the power to provide for trial by courts-martial could thus be made to turn on the nationality of the victim.

the United States, it is reasonable now to provide for military control of Americans accompanying the armed forces abroad. The Constitution is broad enough to encompass these changed circumstances and to sanction the means Congress has chosen for dealing with them. Apart from our additional and alternative argument below (*infra*, pp. 48–65), the war power, the power to govern the land and naval forces, and the "Necessary and Proper" Clause are sufficient in themselves to sustain Article 2 (11).

B. ARTICLE 2 (11) IS A VALID EXERCISE OF THE POWER OF CONGRESS TO MAKE ALL LAWS NECESSARY AND PROPER FOR CARRYING INTO EXECUTION THE SOVEREIGN POWER OF THE UNITED STATES TO MAINTAIN RELATIONS WITH OTHER SOVEREIGNTIES

Article 2 (11) may also be sustained as an appropriate exercise by Congress of its power to enact legislation necessary and proper for carrying into execution those international agreements and treaties negotiated by the President whereby components of the United States armed forces stationed in friendly foreign nations are secured the right to try all persons serving with, employed by, or accompanying those forces for offenses committed by them in such foreign lands for which they would otherwise be subject to trial in the courts of the country where they are stationed.[26] This approach to Article 2 (11) anal-

[26] Another pertinent source of power is that of Congress to implement the President's authority as Commander-in-Chief of our armed forces.

ogizes court-martial jurisdiction over offenses committed outside the United States to similar jurisdiction conferred upon and exercised through much of our history by United States consular courts and similar tribunals (*Dainese* v. *Hale*, 91 U. S. 13; *In re Ross*, 140 U. S. 453).

1. *Article 2 (11) is an aid to and implementation of the conduct of foreign relations*

(a). It is a recognized principle of international law that the jurisdiction of a nation *within its own territory* is generally absolute. *Schooner Exchange* v. *McFaddon*, 7 Cranch 116, 134. No foreign power can of right institute or erect any court of any kind within the limits of another nation except such as may be warranted by or in pursuance of a treaty or agreement or recognized principles of international law. *Glass* v. *The Betsy*, 3 Dall. 6, 16.[27] As a corollary to these principles, there has developed the rule that the character of an act (relating to private parties) as lawful or unlawful is normally determined by the law of the country where the act is done. *Slater* v. *Mexican National R. R. Co.*, 194 U. S. 120, 126. Accordingly, the country in which a civilian accompanying American forces commits the crime of homicide might well insist on trying him in its own tribunals according to its own law.

[27] In this case the attempt of France to exercise admiralty jurisdiction in the United States by the Consuls of France without the warrant of a treaty was held to be without right.

American Banana Co. v. *United Fruit Co.*, 213 U. S. 347, 356; *Phillips* v. *Eyre*, L. R. 4 Q. B. (1869) 225; L. R. 6 Q. B. (1870) 1, 28; see Schwartz, *International Law and the NATO Status of Forces Agreement*, (1953) 53 Col. L. Rev. 1091, 1104–1111; Re, *The NATO Status of Forces Agreement and International Law*, (1955) 50 Northwestern Law Rev. 349, 362–383. The foreign nation may, however, by international agreement, express or implied, or pursuant to accepted rules of international law, consent to the exercise of jurisdiction over American nationals by duly constituted United States authorities for acts done within the territory of the foreign nation. *Dainese* v. *Hale, supra; In re Ross, supra.*

Article 2 (11) may be supported as a recognition and implementation of these settled principles. Civilians accompanying the armed forces overseas would not normally be subject to United States law for local crimes committed overseas, without the consent of the sovereignty in whose territory the crimes are committed. It would not be reasonable to expect a foreign nation to accede to American requests for the right to try such persons under American law unless there were some system by which they could be tried. Manifestly it would hardly be feasible, or generally acceptable to other governments, for the United States to set up in all foreign countries in which its military forces are stationed its own separate civilian courts comparable in all respects

to federal district courts. As for the possibility of providing jurisdiction to the federal district courts to try overseas offenders in the United States, there are many obvious and serious difficulties, even if the foreign governments would be willing to have such cases tried so far from the scene of the crime. For uniformed members of our armed forces overseas, there is already in existence a regulated body of law and procedure which unquestionably can be used as the method of trying them for offenses committed within the territory of a foreign sovereign. For civilian persons accompanying the armed forces overseas, the question becomes whether it is also reasonable to use the existing system of courts-martial as the method for trying them under American law for offenses for which they would, in the absence of international agreement, normally be subject to trial under foreign law in the country where the crime occurred. Article 2 (11), in this aspect, is a description of the class of American civilians abroad over whom the United States could reasonably request a foreign country to relinquish its right to exercise jurisdiction, and is also a method of implementing the jurisdiction which the foreign country has agreed to permit us to exercise within its territory.

In this light, the phrase "accompanying the armed forces" as applied to civilians overseas is governed by entirely different considerations

from those that would apply to construction of the same phrase had Congress attempted to apply it in peacetime to civilians accompanying the armed forces within the United States. In the United States, the phrase in relation to court-martial jurisdiction would mark the dividing line between military trial and a trial by an Article III constitutional court. With respect to local crimes committed by American citizens abroad, however, the foreign land has a significant interest, and Article III judicial power and the provisions for trial by the jury do not apply. *In re Ross,* 140 U. S. 453; see *infra,* pp. 61–65.

"Accompanying the armed forces" in relation to civilians abroad thus marks, not the dividing line between United States civil and military jurisdiction, but the boundary between foreign and United States jurisdiction. It defines the group for whose conduct in foreign countries the United States is prepared to accept responsibility and to provide punishment under American law. Considering that, as shown above, persons accompanying the armed forces bear an intimate relationship to the armed forces and that their conduct does have a direct effect on the prestige and relations of the United States abroad, we think there can be little question of the power of Congress to include them in the group which it desires to be subject to American law overseas, if the right to exercise jurisdiction over them can be obtained from the foreign country

where they commit crime. And in view of that intimate connection with the armed forces and of the large measure of due process which our system of courts-martial provides (see *Burns v. Wilson*, 346 U. S. 137, 142–143), we think Congress was clearly empowered to use, as the method of trying this group under United States law, the existing system of courts-martial. That choice invades no rights of the accused under the Constitution, and affords him a fair trial under an established system of justice.

(b). The importance and direct relationship of Article 2 (11) to the conduct of foreign relations is illustrated by the treaties between the United States and Great Britain as they affect this immediate case.

The United States, unwilling to have American armed forces stationed in the United Kingdom during World War II subject to the jurisdiction of British civil courts, negotiated an agreement in an exchange of notes in 1942 whereby England undertook:

> * * * subject to the necessary Parliamentary authority, to give effect to the desire of the Government of the United States that the Service courts and authorities of the United States Forces should, during the continuance of the conflict against our common enemies, exercise exclusive jurisdiction in respect of criminal offences which may be committed in the United Kingdom by members of those Forces, * * *. [Appendix, *infra*, p. 78.]

In the English note (Appendix *infra*, pp. 78–83), Sir Anthony Eden, then Foreign Minister, after noting that the arrangement involved a "considerable departure * * * from the traditional system and practice of the United Kingdom", pointed out that the readiness of His Majesty's Government to make the agreement was "based upon the assumption that the United States service authorities and courts concerned will be able and willing to try and, on conviction, to punish all criminal offences which members of the United States Forces may be alleged on sufficient evidence to have committed in the United Kingdom."[28]

[28] While England did not wish to make the arrangements in regard to American jurisdiction in England dependent upon a formal grant of reciprocity by the United States in regard to English troops stationed in this country, the Foreign Minister pointed out that, since the same considerations are equally applicable in both countries, His Majesty's Government would find it very agreeable if the United States would accord the same jurisdiction to English service courts in this country.

Congress, acting in accord with the spirit of the agreement with England, passed the Service Courts of Friendly Foreign Forces Act, 1944 (58 Stat. 643; 22 U. S. C. 701–706), to implement the court-martial jurisdiction of the military components of friendly nations within the territorial limits of the United States. By its terms, this Act was to be operative only upon a Presidential finding that its "powers and privileges" were necessary. By Presidential Proclamation No. 2626 of October 12, 1944, the provisions of the Act were made applicable to United Kingdom and Canadian forces stationed in the United States. 9 Fed. Reg. 12303 (1944). Although this Act was designed to reciprocate for the immunity granted American forces in England by the Visiting Forces Act of

Following the acceptance of the English proposals by the United States Ambassador in a note of July 27, 1942 (Appendix, *infra*, pp. 83–84), Parliament ratified the agreement by passage of The United States of America (Visiting Forces) Act of 1942 (5 & 6 Geo. 6, c. 31; Appendix, *infra*, pp. 74–78). After reciting in the preamble that the purpose of the Visiting Forces Act was "to give effect to an agreement recorded in Notes exchanged between His Majesty's Government in the United Kingdom and the Government of the United States of America, relating to jurisdiction over members of the military and naval forces of the United States of America," it provided, in Section 1 (1), for the withdrawal of jurisdiction from the English civil courts over members of the United States Forces. Section 2 (1) declared that its provisions shall apply to "all persons who are by the law of the United States of America for the time being subject to the military or naval law of that country". The Act further provided in Section 2 that the immunity from English prosecution secured to Americans under the agreement would be evi-

1942, it did not grant to the service courts of visiting forces exclusive jurisdiction. It merely recognized and implemented the concurrent jurisdiction of the visiting forces service courts by making it lawful for American arresting officers to surrender custody of foreign forces personnel to their respective commanders for trial by service courts within the United States. Nor did the Act define with precision who should be subject to its terms, but simply provided, in the pattern of the Visiting Forces Act, that it applied to "any member of such force".

denced by a certificate issued by American authorities stating that the person to whom it applied was "subject to the military or naval law of the United States of America" and that the certificate would be "conclusive evidence of that fact" binding on the English authorities. As to appellee, the government of the United Kingdom accepted the certificate, required by the Visiting Forces Act, that appellee came within the provisions of the Uniform Code of Military Justice, and "handed over jurisdiction to the United States military forces" (R. 131).

This illustrates, in actual practice, the significance of Article 2 (11) in international relations. The United Kingdom was willing to regard a person as intimately related to visiting American forces as appellee as subject to United States jurisdiction, but only on the condition and with the understanding that the United States was able and willing to try her. The international agreement by which the United States obtained the right to exercise jurisdiction to try its own national under its own law was both possible and effective because Congress had established a method by which such agreement could operate.

Article 2 (11), in relation to civilians abroad, is an instrument of the conduct of our relations with the countries where our troops are stationed. Congress recognized it as such. The opening clause of Article 2 (11) furnishes internal evidence that its provisions are to be

weighed and read in the light of American foreign affairs. It provides that court-martial jurisdiction over "all persons serving with, employed by, or accompanying the armed forces without the continental limits of the United States" and certain territories shall be "[s]ubject to the provisions of any treaty or agreement to which the United States is or may be a party or to any accepted rule of international law" (*supra*, p. 3). Congress thus disclosed its intent that this phase of court-martial jurisdiction should be construed in the light of treaties and international law and agreements.

(c). The legislative history of Article 2 (11) further demonstrates that Congress intended to correlate the jurisdiction of courts-martial convened on foreign soil with the rights acquired by the United States under treaty arrangements or possessed by virtue of accepted rules of international law. H. R. 4080, as introduced in the House of Representatives and referred to the Committee on Armed Forces, provided in proposed Article 2 (11) that among those subject to the Code would be:

> All persons serving with, employed by, or accompanying the armed forces without the continental limits of the United States and the following Territories: * * *

The Committee, in apparent recognition of the impact of proposed Article 2 (11) on foreign affairs, recommended in its report (H. Rep. No.

491, 81st Cong., 1st Sess.) that it be amended to avoid the possibility of international misunderstanding. It stated, at page 9:

> In addition to the committee amendments to H. R. 2498 which appear as original provisions in H. R. 4080, two substantive amendments to H. R. 4080 which are worthy of comment have been adopted by the committee. * * * The second amendment pertains to article 2, page 5, subdivision 11, beginning on line 18, and subdivision 12, beginning on line 24. Your will note that subdivision 11 confers jurisdiction over all persons serving with, employed by, or accompanying the armed forces without the continental limits of the United States and certain territories. Subdivision 12 confers jurisdiction over all persons within an area leased by the United States which is under the control of the Secretary of the Department and which is without the United States and certain Territories. It has been discovered that the United States armed forces occupy certain territory in the Philippines, which territory was originally acquired for the use of the United States by virtue of the 1898 Treaty with Spain, which territory continues to be used by our armed forces by virtue of the military base agreement of 1947 between the United States and the Philippines. We find that under the provisions of subdivision 12, we will have no jurisdiction over persons not

otherwise subject to this code who enter this property and commit offenses while on the property. It is considered desirable to have such jurisdiction. *On the other hand we fully recognize the fact that certain limitations have been placed upon the jurisdiction of the United States by virtue of certain treaties and agreements and that this jurisdiction may be further curtailed by future agreements. Certainly, we do not desire to arouse the suspicion of any foreign governments by the use of any language in this code which would appear to give the armed forces jurisdiction in excess of obligations which we have already or may in the future assume by treaty or agreement. In order that our intent be made perfectly clear, the following amendment was adopted:* On page 5, line 18, at the beginning of subdivision (11) insert "Subject to the provisions of any treaty or agreement to which the United States is or may be a party or to any accepted rule of international law", and substitute a small a for the capital A in "All". [Emphasis added.]

H. R. 4080 passed the House with this amendment and was referred in the Senate to the Committee on Armed Forces. In its report (S. Rep. No. 486, 81st Cong., 1st Sess.), the Senate Committee pointed out that the jurisdiction conferred on courts-martial under Article 2 (11) will be controlled by treaties and accepted rules of inter-

national law. It stated, at pages 7 and 8 of the report, that:

> Paragraphs (11) and (12) are adapted from 34 U. S. C., section 1201, but are applicable in time of peace as well as war. Both paragraphs, however, have been made subject to the provisions of any treaty or agreement to which the United States is a party or to an accepted rule of international law. Paragraph (11) is somewhat broader in scope then AW 2 (d) in that the code is made applicable to persons employed by or accompanying the armed forces as well as those serving with or accompanying the armed forces, and the territorial limitations during peacetime have been reduced to include territories where a civil court system is not readily available.

The Senate accepted this amendment to Article 2 (11).

Thus, Congress, in conferring jurisdiction on courts-martial over "all persons serving with, employed by, or accompanying the armed forces without the continental limits of the United States", recognized its implications in foreign affairs and sought to prevent embarrassment in international relations by providing that this jurisdiction shall be exercised in accordance with the provisions of treaties or agreements to which the United States is or may be a party or pursuant to accepted rules of international law. Congress was explicitly meshing its enactment

with the rights and interests of the country where the crime was committed, but at the same time it was providing an American forum which could apply American law under an established system of justice.

2. *For the exercise of extraterritorial jurisdiction like that governed by Article 2 (11), Congress was not required to provide for indictment and jury trial in Article III courts, but could authorize trial by court-martial with the guaranties of due process such trial affords*

Once it is recognized that the power conferred by Article 2 (11) is an extraterritorial jurisdiction inextricably involved with the field of international relations, the Article finds clear support in precedent, even apart from the military justification discussed earlier (*supra,* pp. 31–48). Closely in point are *In re Ross,* 140 U. S. 453, the controlling principles there applied, and the substantial legal history sanctioning those principles. See also *Dorr* v. *United States,* 195 U. S. 138 (fn. 30, *infra,* p. 63); *Neely* v. *Henkel,* 180 U. S. 109 (*infra,* pp. 63, 64); *Ex parte Bakelite Corp.,* 279 U. S. 438 (fns. 29, 30; *infra,* pp. 62–63).

The *Ross* case involved the trial and conviction by a consular court in Japan of a seaman on an American vessel for the murder of his mate aboard the ship in the harbor of Yokohama. Upholding the conviction and a life sentence thereunder, this Court rejected the contention that the provisions for such consular courts were

invalid for failure to afford the procedures of indictment and jury trial. Discussing the ancient lineage of such tribunals (p. 462), the Court held that in creating this kind of extra-territorial jurisdiction Congress was not required to follow the provisions of Article III and the Sixth Amendment providing for indictment and trial by jury within the United States (pp. 463–465). The Court pointed out (p. 464) that when "the representatives or officers of our government are permitted to exercise authority of any kind in another country, it must be on such conditions as the two countries may agree, the laws of neither one being obligatory upon the other." And the Court noted the compensating advantage of trial by an American rather than a foreign tribunal (p. 465)—a factor which is considered by many to remain a substantial benefit today. Cf. *Keefe* v. *Dulles*, 222 F. 2d 390 (C. A. D. C.), certiorari denied, 348 U. S. 952.[29]

The constitutional principles sustaining trial for murder in a consular court—with substantially less clear and particular safeguards for the rights of the accused before trial, during trial, and as to appeal than those supplied by the

[29] For the extensive history and practice of American consular courts and similar extraterritorial tribunals, see (in addition to *In re Ross*) 2 Moore, *Digest of International Law* (1906), secs. 262–290; 2 *Hackworth, Digest of International Law* (1941), secs. 177–190; Note, *The United States Court for China*, (1936) 49 Harv. L. Rev. 793; *Ex parte Bakelite Corp.*, 279 U. S. 438, 451.

Uniform Code of Military Justice—would seem *a fortiori* to sustain Article 2 (11). Persons like the appellee subject to this Article are, as we have observed, so closely identified with the military forces that military jurisdiction over them could well be sustained under the war power and the power to govern the armed forces (see pp. 31–48, *supra*); it is surely reasonable—for this extraterritorial area where Article III courts have never been required and where tribunals comparable to courts-martial have been in existence for well over a century (7 Op. Atty. Gen. 495)[30]—to exercise American control overseas through this existing and carefully regulated system of tribunals.

Again, we note the relevance of *Madsen* v. *Kinsella*, 343 U. S. 341, and also of *Neely* v. *Henkel*, 180 U. S. 109. Both cases involved trials of American civilians in occupied territory—in *Madsen*, by an American occupation tribunal applying German law, in *Neely*, by a Cuban court constituted under American occupation authority. In *Madsen*, where this Court stated that trial by court-martial would also have been proper

[30] The constitutional provisions for jury trial and for indictment by grand jury have also been held not to apply to unincorporated territories and possessions of the United States. *Hawaii* v. *Mankichi*, 190 U. S. 197; *Dorr* v. *United States*, 195 U. S. 138; *Ocampo* v. *United States*, 234 U. S. 91; *Balzac* v. *Porto Rico*, 258 U. S. 298. The judges of the courts in such places need not be given life tenure. *Ex parte Bakelite Corp.*, 279 U. S. 438, 449, 451.

(*supra*, pp. 41–42), the court which was held to have jurisdiction over the defendant was established by executive authority rather than by statute. In both cases, there was neither indictment nor jury trial.

To be sure, those cases involved occupation rather than military bases established by consent on the soil of a friendly foreign power. We believe, nevertheless, that the underlying principles relating to the war power and the power over international affairs are of persuasive significance here. Read with the *Ross* case, these decisions show the wide scope of the power to exercise extraterritorial jurisdiction through tribunals other than those established under Article III. They show that, at least where basic guaranties of due process are met (a matter far more certain here than it was in *Neely* v. *Henkel*), an American accused of crime in a foreign land has no right to insist upon indictment and jury trial even though he is to be tried either by an American tribunal or under American auspices. Indeed, it might be urged that there was more reason in *Madsen* and *Neely* to require trial by an Article III court, for the United States, as occupying power, was in a position to impose its will on the occupied country and could therefore have insisted on having the trial in a federal district court in this country. In this case, on the other hand, the United States must deal with an equal foreign sovereign which has a proper

interest and claim to a trial within its own borders and could probably insist, in almost all cases, on trying the accused in its own courts under its own law. See *supra*, pp. 49–51.

The appellee, for an alleged offense in England, is to be tried by a court of a type to which millions of Americans are and have been subject even for offenses within the United States. There is every reason to believe that the trial and appellate procedures, which have already resulted in reversal of her conviction with leave to retry her, will be fair ones. In the circumstances, the Constitution requires no more.

III

JURISDICTION OVER APPELLEE UNDER ARTICLE 2 (11) WAS NOT LOST BY REASON OF HER TRANSPORTATION TO THE UNITED STATES, HER IMPRISONMENT IN THE FEDERAL REFORMATORY FOR WOMEN, OR THE REVERSAL OF HER CONVICTION BY THE COURT OF MILITARY APPEALS

The appellee also contends (Motion to Dismiss or Affirm, pp. 12–14) that, assuming the validity of Article 2 (11), jurisdiction over her under that Article was lost because she was returned in custody to the United States, where her conviction was reversed and a rehearing authorized. If it were sound, this argument would mean that persons tried under Article 2 (11) must be kept overseas during trial, appeal, retrial, and perhaps during any ensuing period of imprisonment, in order to prevent a loss of military juris-

diction. This odd requirement could, of course, be met in another case if there were any reason for it. But there is no constitutional or statutory justification for its imposition.

The court-martial jurisdiction asserted over appellee by virtue of the proceedings commenced in England, will, under established principles of law, continue until a final disposition of the case. *Barrett* v. *Hopkins,* 7 Fed. 312, 315 (C. C. D. Kan.). The rule is recognized that court-martial jurisdiction which has attached to a serviceman is not defeated by the expiration of his enlistment before the conclusion of the proceedings. *In re Bird,* Fed. Case No. 1,428 (D. Ore.). This general rule is dictated by imperative considerations of public policy and is grounded on sound reason. To hold that a soldier, on the eve of his discharge, can, with impunity, commit any of the myriad of military offenses so disruptive of essential discipline and, on the morrow, escape all punishment would greatly demoralize the military service. Military jurisdiction in such cases must be maintained until such time as the service, by an unequivocal act, demonstrates its intent to relinquish its jurisdiction. In this case, the original jurisdiction asserted over appellee has continued. The action of the Court of Military Appeals in setting aside the conviction of appellee and ordering a rehearing (R. 110) did not divest the Air Force of jurisdiction over her under Article 2 (11). Since the Court of Mili-

tary Appeals did not rule that the service court was without jurisdiction to try her, there is no ground for construing the order for the new proceeding at Bolling Air Force Base (R. 122) as an original assertion of military jurisdiction over her. The court ordered a rehearing which is merely a continuation of the original proceedings.

A rehearing may be ordered by the Court of Military Appeals when it sets aside the findings and sentence as approved by the convening authority and as affirmed or set aside as incorrect in law by the Board of Review (Article 67 (d), (e), 50 U. S. C. 654 (d), (e)). The nature and function of a rehearing is specifically defined in Article 63 (50 U. S. C. 650), which provides:

> (a) If the convening authority disapproves the findings and sentence of a court-martial he may, except where there is lack of sufficient evidence in the record to support the findings, order a rehearing, in which case he shall state the reasons for disapproval. If he disapproves the findings and sentence and does not order a rehearing, he shall dismiss the charges.
>
> (b) Every rehearing shall take place before a court-martial composed of members not members of the court-martial which first heard the case. Upon such rehearing the accused shall not be tried for any offense of which he was found not guilty by the first court-martial, and no sentence in excess of or more severe than the original sentence shall be imposed un-

> less the sentence is based upon a finding of guilty of an offense not considered upon the merits in the original proceedings or unless the sentence prescribed for the offense is mandatory.

The legislative history of Article 63 clearly shows that Congress understood that "a rehearing is a continuation of the former proceeding." [31] The military courts which have had occasion to consider the nature of a rehearing have followed this declaration of legislative purpose and repeated the phrase that it is but a continuation of the original proceeding. *United States* v. *Padilla,* 5 CMR 31, 42; *United States* v. *Moore,* 5 CMR 438, 444; *United States* v. *Milbourne,* 15 CMR 527, 528.[32]

The jurisdiction properly asserted over appellee by the original court-martial was not defeated by reason of her return to the United States in Air Force custody or her confinement in the Federal reformatory under court-martial sentence. Such return and confinement did not

[31] H. Rep. No. 491, 81st Cong. 1st Sess., p. 30; S. Rep. No. 486, 81st Cong. 1st Sess., p. 27.

[32] Col. Frederick Bernays Wiener, in testifying before a Subcommittee of the Committee on Armed Forces of the House of Representatives on HR 2498, which became the Uniform Code of Military Justice, pointed out that a rehearing of the charge against an accused does not, in military law where appeals are automatic, constitute a second jeopardy. Hearings before a Subcommittee of the Committee on Armed Services on H. R. 2498, House of Representatives, 81st Cong., 1st Sess., p. 803.

operate as a waiver or surrender of military jurisdiction over appellee. Article 58 of the Uniform Code of Military Justice (50 U. S. C. 639) provides in part:

> * * * any sentence of confinement adjudged by a court-martial or other military tribunal * * * may be carried into execution by confinement in any place of confinement under the control of any of the armed forces, or in any penal or correctional institution under the control of the United States, or which the United States may be allowed to use * * *.

And Section 4083, Title 18 U. S. C., states in part:

> Persons convicted of offenses against the United States or by courts-martial and sentenced to terms of imprisonment of more than one year may be confined in any United States penitentiary.

The convening authority conformed to Article 58 and Section 4083 when, on approving the sentence of the court-martial, he designated the Federal Reformatory for Women at Alderson as the place of confinement pending appellate review (R. 2).

Thus, the return of appellee to the United States in Air Force custody and her subsequent confinement in the Federal reformatory on orders of military authority demonstrate that the Air Force was maintaining and asserting jurisdiction over her and rebut any inference that it intended, by returning her to this country, to surrender its

jurisdiction. Cf. *United States ex rel. Mobley* v. *Handy*, 176 F. 2d 491 (C. A. 5), certiorari denied, 338 U. S. 904. Her return and confinement were in execution of the sentence imposed by the court-martial; they followed from and were based on the jurisdiction over her under Article 2 (11) as a person "accompanying the armed forces." To say that her return and confinement in the United States defeated military jurisdiction over her would result in the anomalous situation of having a valid exercise of jurisdiction under Article 2 (11) defeated by execution of a sentence imposed in accordance with Article 58.

Even when a soldier has been discharged he is deemed in military custody while he is serving his military sentence.[33] *Carter* v. *McClaughry*, 183 U. S. 365; *Kahn* v. *Anderson*, 255 U. S. 1, 7. In *Carter* v. *McClaughry* the Court stated (p. 383):

> The accused was proceeded against as an officer of the Army, and jurisdiction attached in respect of him as such, which included not only the power to hear and

[33] Article 2 (7) of the Uniform Code of Military Justice limits the jurisdiction of the armed forces over military prisoners confined in non-military prisons for offenses committed therein, but it does not alter the principle set forth in the cases in the text that a change in status of an accused does not divest the military service of jurisdiction over him once it has properly attached.

The provisions of Article 2 (7) have no application in this case to appellee as she will be tried at the rehearing on the original charges and not for an offense committed while she was confined in the Federal reformatory pending the completion of the appellate review of her case.

> determine the case, but the power to execute and enforce the sentence of the law. Having been sentenced, his status was that of a military prisoner held by the authority of the United States as an offender against its laws.

Since the change of status of Carter from soldier to military prisoner did not deprive the Army of jurisdiction to try him as long as he remained in Army custody, no reason appears why appellee's return to this country in Air Force custody and her confinement under Air Force orders should defeat the right of the Air Force to re-try her under the same jurisdiction it originally asserted in England. Appellee's status as a military prisoner alone suffices to preserve military jurisdiction. The Court in *Kahn* v. *Anderson, supra,* pp. 7–8, cited with approval in *Toth* v. *Quarles,* 350 U. S. 11, stressed the importance of custody to jurisdiction when it wrote:

> * * * we are of opinion that, even if their discharge as soldiers had resulted from the previous sentences which they were serving, it would be here immaterial, since, *as they remained military prisoners, they were for that reason subject to military law and trial* by court-martial for offenses committed during such imprisonment. [Emphasis added.]

There is therefore nothing anomalous in the happenstance that appellee's retrial has been or-

dered to be held in Bolling Air Force Base rather than in England.

The decision of the Court in *Toth* v. *Quarles*, 350 U. S. 11, is entirely consistent with the proposition that the return of appellee to the United States in Air Force custody and her confinement at Alderson under a court-martial sentence does not destroy the jurisdiction of the Air Force to conduct a rehearing. In the *Toth* case the Air Force had unequivocally demonstrated its intent to relinquish all jurisdiction over the accused by granting him an honorable discharge. The Air Force, on the other hand, has never demonstrated an intent to surrender its jurisdiction over appellee. By returning her to the United States in custody, by confining her under court-martial sentence, by transferring her to Washington, D. C., it patently demonstrated its intent and purpose to continue to assert jurisdiction over her. Thus, the *Toth* case is distinguishable from this on both its facts and its underlying principle.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment below should be reversed.

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